UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

SUN CAB, INC. d/b/a
NELLIS CAB COMPANY

and **Case 28-CA-079813**

ABIY AMEDE, an Individual

ACTING GENERAL COUNSEL'S ANSWERING BRIEF

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I. INTRODUCTION

Pursuant to Section 102.46 of the Rules and Regulations of the National Labor Relation Board (the Board), the Counsel for the Acting General Counsel (General Counsel) submits this Answering Brief to the Exceptions filed by Sun Cab, Inc. d/b/a Nellis Cab Company (Respondent), to the Decision (ALJD) of Administrative Law Judge Jay R. Pollack (ALJ) in this matter.[1]

By its exceptions and the arguments in support thereof, Respondent seeks to have the Board ignore the record evidence and the well-reasoned credibility determinations of the ALJ that Respondent, among other things: unlawfully disciplined employees for engaging in a protected strike after its drivers removed their cabs from service to protest the potential authorization of additional Las Vegas taxi cabs; interrogated its employees because they engaged in the protected strike; terminated its employee Abiy Amede for dual motivation which included his Union and protected concerted activities. Further, Respondent seeks to overturn the decisions of the ALJ including: the characterization of the drivers' protected strike as an "extended break;" the ALJ's finding that the strike did not lose protection of the Act; the ALJ's recommended Conclusions of Law, Remedy, Order, and Notice. Respondent

[1] The ALJD was issued on December 27, 2012.

should prevail on its exceptions only if the Board chooses to ignore the record evidence and deviate from its established policy of not overruling an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces the Board that the administrative law judge's credibility resolutions are incorrect. *Standard Dry Wall Products*, 91 NLRB 544, 545 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). Furthermore, to succeed on Respondent's exceptions regarding the Remedy and Notice, the Board would have to abandon its standard remedies and leave the employees who were subjected to the unfair labor practices without any identifiable remedy. To prevail on Respondent's legal arguments, the Board would have to reverse its well-established precedents regarding protected concerted activities. Respondent's exceptions are without merit and should be denied in their entirety.

II. FACTS

A. Respondent's Operations

Respondent is a corporation with an office and place of business in Las Vegas, Nevada, is engaged in the providing of taxicab services in the Las Vegas metropolitan area, and is one of 16 cab companies certificated to operate in Las Vegas by the Taxicab Authority (TA). (ALJD 2:5-6, 17-19) [2] The TA issues certificates to companies to operate a taxicab business and issues medallions which authorize a certificated company to operate one cab per medallion. (ALJD 2:18-20) Respondent has 137 medallions to operate some of its approximately 171 cabs. (ALJD 2:19-20)

Respondent is owned by Ray Chenoweth (Chenoweth), with Director of Operations Jamie Pino (Pino) in charge of hiring, firing, scheduling employees, and managing eight

[2] RB__ refers to Respondent's Brief in Support of Exceptions followed by the page. Transcript references are: (Tr. __:__) showing transcript page and line or lines. ALJD __:__ refers to JD(SF)-57-12 issued by the ALJ on December 27, 2012, followed by page and line. GCX___ refers to General Counsel's Exhibit followed by exhibit number.

supervisors. (ALJD 3:11, 17) Respondent requires its drivers to work 12 hours a day "not including a mandatory one-hour lunch break" four or five days each week. (GCX 2 at 2, 3, 32, 43; GCX 35(a)) The drivers must log the one-hour lunch break, and can also take two 15-minute breaks. (Tr. 39:15-19; 50:20-25; GCX 2 at 43) Respondent employs extra board drivers who are given remaining cabs early in the shift, leaving no surplus drivers shortly after the shift starts. (Tr. 49:11-25, 50:1-19) Respondent uses an Employee Handbook for its taxicab drivers which explains the drivers' compensation formula although the formula is subject to management discretion. (ALJD 3:4) Drivers are not paid an hourly wage, and are only paid a commission which is based on ½ of "Net Book." (ALJD 2:27-28) Net Book is defined as:

> Net Book = Gross Book* less All Fuel Usage** less All Trip Adjustments***
> Your commission is ½ of Net Book.
> *Gross Book is defined as Total Money (on meter) plus Not On Meter less Run Outs less Meter Jumps.
> **Fuel usage adjustments are subject to change at any time at the discretion of management.
> ***Trip adjustments are subject to change at any time at the discretion of management. (GCX 2 at 2)

B. Driver Opposition to Additional Cabs and the February 4, 2012, "Extended Break"

In early 2012,[3] the TA considered issuing more medallions to the certificated companies, which would have resulted in more cabs on the road and more competition for the drivers. (ALJD 2:30-34) In response to the potential increase in cabs, drivers from across the 16 Las Vegas cab companies organized a protest to the additional medallions and resulting cabs via an industry-wide extended break to take place on Saturday February 4, the day before the Superbowl. (ALJD 2:31-37) Several of Respondent's drivers started their extended breaks by driving to an Ethiopian restaurant where they found taxi drivers from all of the Las

[3] All dates are 2012, unless otherwise noted.

Vegas cab companies. (ALJD 2:37-40) Over a short period of time, approximately 200 cabs from the 16 cab companies gathered at the restaurant where they discussed what could be done about the number of cabs operating in Las Vegas including unionization, and some drivers talked to the on-scene news channel. (ALJD 2:39-40) Many drivers from the 16 companies completed the extended break by driving their cabs to Las Vegas Boulevard and driving down "The Strip" while refusing to pick up customers. (ALJD 2:40-41) After they drove part of The Strip honking their horns and flashing their hazard lights, they returned their cabs to service and started taking customers. (ALJD 2:41-42) The total length of time for the extended break was two to three hours. (ALJD 2:42-43)

Some of Respondent's drivers continued picking up customers and collecting fares for the remainder of their shifts, while other drivers were ordered to fuel their cabs and return to Respondent's yard. (ALJD 2:45-47) For those who were ordered to take their cabs out of service, a supervisor awaited them and told them to call on Monday. (Tr. 234:12-14; 293:14-25, 294:1-2; 316:11-14) There were no drivers waiting to return the cabs to service, even though several hours of the shift remained. (Tr. 294:3-24; 317:18-22) In total, there were 17 drivers who were suspended for varying lengths of time for participating in the extended break, and each was given an Employee Warning Notice which cited "Unsatisfactory Performance," "Violation of Company Policies/Procedures" and stated that they took more than a one-hour lunch break in violation of Nellis Cab Rules, but the "long break" warnings did not cite TA requirements under the NRS or NAC. (ALJD 2:47-48, 3:1; GCX 11-27) Some of the drivers were also given an Employee Warning Notice for "Violation of Company Policies/Procedures" and "Violation of NAC.NRS" for falsifying their trip sheet because it did not match the GPS report. (ALJD 3:1-2; GCX 13(b); 15(b); 18(b); 19(b); 21(b); 22(b);

23(b); 25(b); 27(b)) During the meetings where the drivers were disciplined, Pino told them this was their final written warning, if the long break happened again there would be terminations, asked them why they took the long break, and asked the identity of the leader. (ALJD 3:10-13; Tr. 110:14-23; 111:13-16; 237:12-22) The ALJ found these acts to be unlawful interrogation. (ALJD 6:8-11) Respondent was aware of the extended break for up to a week before it occurred. (RB 20; Tr. 82:17-24; 83:9-17) Respondent grossed over $105,000 in fares the day of the strike notwithstanding the extended break. (GCX 10(g))

The TA held a meeting on February 28 to address the additional medallions. The meeting was expected to draw such a large attendance that the meeting was held at Cashman Field, a complex with a baseball stadium and conference centers, but that was not enough to accommodate the turnout. (Tr. 27:21-23; 28:14-16; 29:16-21; 30:1-3) Pino attended the meeting, advocated for more medallions and provoked the crowd enough that the meeting was temporarily recessed. (Tr. 27:21-25; 30:10-25, 31:1-3)

III. RESPONDENT'S EXCEPTIONS

A. The Clear Preponderance of the Evidence

In its exceptions and brief in support, Respondent makes arguments which challenge the ALJ's findings, some of which are based on credibility determinations or the conclusions based on those credibility determinations. In considering the testimony of each witness and weighing the evidence presented at hearing, the ALJ assessed the credibility of witnesses based not only on a review of the record, but also gave consideration to reasonable probability and the demeanor of the witnesses. (ALJD at 1 fn. 1) The ALJ had the advantage of observing each of the witnesses who testified, and the Board gives considerable weight to an ALJ's credibility findings. *Standard Dry Wall Products*, 91 NLRB at 545. Respondent's

arguments do not raise the necessary level of doubt to the ALJ's credibility resolutions in order to have those conclusions reversed.

B. The February 4 Strike (Respondent's Exceptions 1 and 2)

Respondent makes a variety of arguments that it did not violate the Act, and claims several factors to support its assertion, including: the length of time of the strike; the impact of the strike; the status of the strike as a sit-down strike; and that it could not remedy the drivers' concerns.

1. The Length of the Strike

Respondent argues that the ALJ improperly characterized the work stoppage as an extended break, urging that all of the time should be characterized as a strike, and that no allowance should be given for the amount of time the drivers were permitted for lunch and breaks because the drivers worked staggered shifts and the drivers are to take their lunches at the middle of their shifts. (RB 1, 3) Respondent argues that in considering the length of the strike, the Board should consider that the participating drivers prevented it from operating taxicabs in accordance with Nevada Revised Statutes. (RB 4) It further claims that the impact of the entire three-hour period, coupled with Respondent's inability to operate the cabs during that period, should be factored into the Board's analysis. (RB 5-6)

The ALJ found that the strike lasted two to three hours as Respondent claims. Even considering the full three hours, the ALJ found that the drivers did not lose protection of the Act. Additionally, many of the drivers who participated at least partly coincided their protected activities with their lunch break.[4] The ALJ properly found that the strike was

[4] If anything, the amount of productive time which Respondent lost is reduced by a "required" mandatory lunch break regardless of what shift the participating driver worked, or what time during the shift the lunch and break were taken. Further, Respondent admits that it "did not usually dictate when drivers would take their precise lunch hour[.]" (RB 5)

protected, even considering the length of three hours. Cf. *Atlantic Scaffolding Co.*, 356 NLRB No. 113, slip op. at 2 (2011) (finding that the employer violated the Act by terminating its unrepresented employees who went on strike two days earlier and rejecting the administrative law judge's finding that the employees lost protection); *Bethany Medical Center*, 328 NLRB 1094, 1094 (1999) (finding a two-hour walkout was protected activity notwithstanding that the employees refused to perform scheduled catheterization procedures and refused to return to work to perform an emergency procedure on a patient experiencing chest pains).

2. Respondent's Claim of an Unprotected Sit-Down Strike

Respondent argues that the strike was an unprotected sit-down strike. (RB 6, 12) It further claims that unrepresented employees are allowed protection for "spontaneous" strikes and that an organized, calculated strike is unprotected. (RB 6-7, 17-18, 23) Respondent also argues that the strike is a classic sit-down strike based on the withholding of services and analogizes it to a "striking production worker [who] sits at his machine preventing others from operating it." (RB 12) Respondent cites no cases stating that only a spontaneous strike is protected. In analyzing the drivers' actions, Respondent asserts that: the work stoppage was peaceful; the work stoppage interfered with production and deprived it of its property which was not sufficiently analyzed by the ALJ for severity of impact including the timing, length of time, financial impact and impact on the public;[5] the employees had adequate opportunity to present grievances; the discipline issued should be considered a warning to leave the premises or face discharge; that employees remained on the premises by occupying

[5] Respondent further argues that the case should be analyzed based on the potential impact of the case, and that the tourist industry, and special events should be considered in analyzing employees' rights to strike. (RB 19-20)

cabs beyond their lunch hour or breaks; and the employees attempted to seize Respondent's property by making it impossible for Respondent to operate the cabs. (RB 10-17)

A "single concerted walkout is presumptively protected, absent evidence that the work stoppage is part of a plan or pattern of intermittent action inconsistent with a genuine withholding of services or strike." *Daniel Construction Co.*, 277 NLRB 795, 795 (1985) (finding protected the walkout of four employees who left their work areas after being denied permission to leave in order to protest their working conditions due to the weather). See also *HMY Roomstore, Inc.*, 344 NLRB 963, 964 (2005) (finding 45 to 60 minute refusal to work to be heard was protected); *Bethany Medical Center*, 328 NLRB at 1094; *TPA, Inc.*, 337 NLRB 282, 282 (2001) (finding protected conduct which did not lose the Act's protection and employees were "entitled to persist in their in-plant protest for a reasonable period of time" which in *TPA* lasted for 15 to 20 minutes, was peaceful, focused on a specific job-related complaint, and caused little disruption to production of employees who continued to work).

Respondent relies on *Quietflex Mfg. Co.*in drawing its comparison, but that reliance is misplaced. *Quietflex Mfg. Co.*, 344 NLRB 1055, 1055-1056 (2005) (finding the employees' refusal to leave the parking lot lost the Act's protection after the employees had been there over 11 hours, had been instructed to leave by the vice president and president, and after the president had met one of the group's demands, stated the other issues were open for discussion, and offered to meet with delegates from the group. Each time, the employees refused to meet until all their demands were met in spite of at least three offers to meet and discuss). See also *Atlantic Scaffolding Co.*, 356 NLRB No. 113, slip op. at 2-3 (finding, contrary to the administrative law judge, that *Quietflex* and related cases were inapplicable where the employees did not "occup[y] their employer's property in the face of the

employer's order to leave and deprived the employer of the use of its property for an unreasonable period of time"); *HMY Roomstore, Inc.*, 344 NLRB 963 fn. 2 (finding unlawful the suspension and discharge of employees for refusing to return to work from an in-plant work stoppage where the employees left the building after being told to do so, and minimizing the employer's open-door policy where it had not been used to address group complaints). In this context, the allowed 60 to 90 minutes of break reduces any claimed time that Respondent was deprived of its cabs. The *Quietflex* analysis does not apply where, as here, the employees did not refuse an order to leave or deprive the employer of the use of its property for an unreasonable period of time. *Atlantic Scaffolding Co.*, 356 NLRB No. 113, slip op. at 2-3.

Respondent argues that the employees unlawfully seized the taxicabs as they were no longer in service and were not returned to it where it could have placed them in service with different drivers. This argument fails for several reasons. First, the fact that the drivers did not immediately return the cabs falls far short of an unlawful trespass and seizure. Cf. *NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. 240 248-257 (1939) (finding a strike was an illegal seizure of the employer's buildings and were acts of force and violence to compel the employer to submit; the employees refused police orders and a court injunction to leave, and resisted the sheriff which resulted in their arrest); *Cambro Mfg. Co.*, 312 NLRB 634, 636 (1993) (finding the employees' peaceful actions which caused little disruption to other employees became unprotected after they were directed to return to work a second time where the employees' demands for a meeting had been granted prior to the order to return to work). Second, there were no drivers to drive the cabs even if the drivers returned the cabs. In this instance, Respondent chose not to have drivers standing by even though it was aware the extended break was possible for a week before it occurred. Third, the drivers put the cabs

back in service as soon as they were done, as opposed to seizing the property for an extended period of time. Cf. *NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. at 248-257. Fourth, the drivers did not ignore any police or court orders to return the cabs to service. Id. Fifth, the drivers returned the cabs to Respondent upon demand. Sixth, the drivers are not required to be insurers for Respondent's customers to ensure that they can find alternate service elsewhere. Cf. *Bethany Medical Center*, 328 NLRB at 1095. Seventh, the drivers' strike is analogous to a worker's refusal to provide his own services in a factory; it is not relevant that no one else can run the machine as reasonableness is not relevant. The out-of-service cab is analogous to the unused machine considering the transient nature of taxi work and the lack of standby drivers.

Respondent concedes that the drivers could have lawfully engaged in a strike by leaving their taxicabs at its yard. (RB 20) Such a statement undercuts its arguments, as leaving the cabs at the yard would have placed Respondent in essentially the same position as it found itself. Respondent would have needed to scramble to assemble replacement drivers if it chose to do so. It asserts that the "striking employees prevented Respondent from even trying to get extra-board drivers, or replacement drivers or qualified supervisors to drive the taxicabs[,]" but such an assertion is not supported, as there was nothing which prevented Respondent from "trying to get extra-board drivers" when it instead focused on removing operating cabs from service and ending the drivers' shifts early.

There is nothing which removed the employees from the Act's protection. The drivers did not seize the Respondent's cabs for an unreasonable time, did not refuse police or court orders to leave, and returned the cabs to service at the end of the strike. (ALJD 4:47-48); Cf. *NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. at 258-257. The instant situation lacks an

employer statement offering to meet some of the employees' demands, and lacks an open-door policy which was shown to address group concerns. Cf. *Quietflex Mfg. Co.,* 344 NLRB at 1055-1056; *HMY Roomstore, Inc.*, 344 NLRB at 963; *TPA, Inc.*, 337 NLRB at 286-287; *Cambro Mfg. Co.*, 312 NLRB at 636. The non-service of some of Respondent's customers is not relevant. *Bethany Medical Center*, 328 NLRB at 1094. The strike was a single concerted walkout as opposed to a series of intermittent withholding of services, and is therefore presumptively protected. *Daniel Construction Co.*, 277 NLRB at 795. The work stoppage was peaceful, was focused on the specific job-related complaint of the number of taxi cabs, caused no disruption to the work performed by other drivers who chose to work, and continued for a reasonable period. As such, the drivers never lost protection of the Act. Cf. *HMY Roomstore, Inc.*, 344 NLRB at 965-966.

3. Respondent's Defense that it Could Not Remedy the Drivers' Concerns

Respondent argues that the strike was only directed at the TA, and was beyond its ability to address the drivers' concerns. (RB 8-10) In making its argument, Respondent inappropriately attempts to expand the record evidence, citing material in Nevada Revised Statutes (NRS) and Open Meetings Act, neither of which were introduced into evidence. Further, Respondent did not request that the ALJ take administrative notice of these items. Such an addition to the record is improper under the Board's Rules and Regulations and should be rejected.[6]

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[6] The charge upon which the complaint was issued and any amendments thereto, the complaint and any amendments thereto, notice of hearing, answer and any amendments thereto, motions, rulings, orders, the stenographic report of the hearing, stipulations, exhibits, documentary evidence, and depositions, together with the administrative law judge's decision and exceptions, and any cross-exceptions or answering briefs as provided in section 102.46, shall constitute the record in the case. Board's Rules and Regulations § 102.45(b)

Respondent errs in its argument that it is excused in its actions because of some claimed inability to resolve the drivers' concerns. Respondent's contention is contrary to the language of the Act including Section 2(9) which provides:

> The term "labor dispute" includes any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, *regardless of whether the disputants stand in the proximate relation of employer and employee*. 29 U.S.C. § 152(9) (emphasis added).

Section 2(2) of the Act states: "[t]he term 'employer' includes any person acting as an agent of *an employer*, directly or indirectly" and does not specify that employer means the employer of a particular employee. 29 U.S.C. § 152(2) (emphasis added). Section 2(3) of the Act states in relevant part that "[t]he term 'employee' shall include any employee, and *shall not be limited to the employees of a particular employer*, unless the Act explicitly states otherwise[.]" 29 U.S.C. § 152(3) (emphasis added).

In addition to the statutory language, the Act's protections have been held to extend beyond the relationship of employer to employee. *Eastex, Inc. v. NLRB*, 437 U.S. 556, 558-566 (1978) (finding the employer violated Section 8(a)(1) when it prohibited its employees from distributing flyers regarding a right to work statute, and a Presidential veto of an increase in the federal minimum wage). In *Eastex*, the Supreme Court specifically rejected the employer's argument that the "'mutual aid or protection' clause of § 7 protects only concerted activity by employees that is directed at conditions that their employer has the authority or power to change or control" and rejected the argument that "the term 'employees' in § 7 refers only to employees of a particular employer, so that only activity by employees on behalf of themselves or other employees of the same employer is protected." Id. at 562-566. The cases cited in *Eastex* stand for the proposition that the mutual aid or protection clause

"protects employees from retaliation by their employers when they seek to improve working conditions through resort to administrative and judicial forums[.]" Id. at 566. (internal citations omitted) Moreover, a respondent "violates Section 8(a)(1) of the Act if, having knowledge of an employee's concerted activity, it takes adverse employment action that is 'motivated by the employee's protected concerted activity.'" *CGLM, Inc.*, 350 NLRB 974, 979 (2007) (citing *Meyers Industries (Meyers I)*, 268 NLRB 493, 497 (1984)).

Respondent asserts that it was bound by TA requirements to keep cabs in service. However, if the service requirement had been a concern of Respondent, it would not have removed cabs from service without having standby drivers to place the cabs back in service. Instead, it willfully violated any such requirement when it removed cabs from service to send drivers home early. If Respondent had considered such a need, it would have arranged to have standby drivers ready, considering it had known about the pending extended break for approximately a week. Additionally, if Respondent acted in reliance on a TA requirement, it seems logical that it would have cited it for the extended break warnings similar to what it did for the falsification warnings. (GCX 11-27) What it could have done is useless conjecture. The fact is that it did nothing except retaliate against its drivers. It knew of the pending extended break but chose not discuss the issues with its drivers or even inquire into the issues. It did not mobilize standby drivers beforehand or during the break. Instead, it removed cabs from service, contrary to its feigned reliance on TA requirements. Further, Respondent provided no statutory evidence at hearing requiring that *all* taxis must remain in service at all times.

In making its claim that the strike was directed toward the TA and was beyond its authority to remedy, Respondent omits the fact that Respondent petitioned the TA to

authorize additional cabs as evidenced by Pino's representation at the TA meeting on February 28, which was the very subject and focus of the extended break. Although it knew of the pending extended break, it did nothing to try to resolve the issue with its drivers even though it was seeking additional cabs. Contrary to Respondent's assertion that the issue was beyond its control to remedy, Respondent was knee-deep in advancing an issue which the drivers saw as a serious blow to their livelihoods, and inflamed the issue by pressing for additional cabs.

The employees were engaged in a legitimate labor dispute protected under the Act regardless of whether they were striking to make a statement against the TA or against Respondent's desire for additional cabs. *Eastex, Inc. v. NLRB*, 437 U.S. at 558-566; *Northeast Beverage Corp.*, 349 NLRB 1166, 1166-1167 (2007). Having knowledge of the protected activity, Respondent violated the Act when it took adverse employment action based on that activity. *CGLM, Inc.*, 350 NLRB at 979; *Meyers Industries (Meyers I)*, 268 NLRB at 497.

4. Respondent's Claim that Impact Should be Considered

Respondent errs in its argument that the employees lost protection based on impact. The legitimacy of a strike is not lost based on protecting employer's customers, providing continued service, following company rules, or by taking actions which are "unreasonable" in relation to the subject matter of the dispute. Strikers are not required to return to work even to protect customers or to help them obtain services elsewhere. See *Bethany Medical Center*, 328 NLRB at 1095 (citing *Montefiore Hospital & Medical Center*, 243 NLRB 681, 683 (1979)). Employees' refusal to return to work can still be protected even where it is contrary to company rules requiring things such as permission to leave the job. *Daniel Construction*

Co., 277 NLRB at 795. In *Tamara Foods, Inc.*, 258 NLRB 1307, 1308 (1981), the Board held:

> Inquiry into the objective reasonableness of employees' concerted activity is neither necessary nor proper in determining whether that activity is protected. As we stated in *Plastilite Corporation, supra*, "we must respectfully disagree with any rule which would base the determination of whether a strike is protected upon its reasonableness in relation to the subject matter of the labor dispute. When a labor dispute exits, the Act allows employees to engage in concerted activity which they decide is appropriate for their mutual aid and protection, including a strike, unless . . . that activity is specifically banned by another part of the statute, or unless it falls within certain other well-established proscriptions." Whether the protested working condition was actually as objectionable as the employees believed it to be, or whether their objection could have been pressed in a more efficacious or reasonable manner, is irrelevant to whether their concerted activity is protected by the Act. Nor does the fact that employees fail to make a specific demand to the employer automatically render their conduct unprotected. *Particularly where the employees are not represented by a labor organization which may speak to the employer on their behalf, "if from surrounding circumstances the employer should reasonably see that improvement of working conditions is behind the walkoff, it may not penalize the employees involved without running afoul of Section 8(a)(1).*" (internal citations omitted) (emphasis added)

Respondent argues that its financial impact and inconvenience to the public should be considered. It made a total of $105,000 in fares operating its 137 medallions for the 24 hours of February 4, yet claims that the 17 drivers who took a maximum of three hours away from work reduced its fares by $50,000 to $100,000, even though they were allowed to take 60 to 90 minutes of that time as lunch and break. (RB 11) Respondent's claim is unsupported and, if not disingenuous, is questionable, at best.[7] Respondent's financial harm argument is contrary to well-established Board law. Cf. *Atlantic Scaffolding Co.*, 356 NLRB No. 113, slip op. at 3 (rejecting the employer's argument that the work stoppage lost protection because of economic harm inflicted on it as "antithetical to the basic principles underlying the statutory scheme"); *Tamara Foods, Inc.*, 258 NLRB at 1308. Here, Respondent made money hand-

[7] Using the smaller of Respondent's claimed losses: $50,000 in "lost" fares divided by 51 hours (17 drivers times 3) equals $980 lost per hour per driver. At $100,000, the amount is $1960 per hour per driver.

over-fist on February 4 in spite of the strike. The fact that Respondent took cabs out of service hours early shows that it was willing to forego the corresponding fares and profit in order to send a message to the drivers that this activity would not be tolerated.

Similarly, its claim that drivers used its fuel ignores the Handbook which specifies that drivers are paid a commission based on a split of fares, and that fuel costs are subtracted from fares before drivers receive any remaining split of the fares. Respondent's own website states that "[w]e offer very competitive pay, with drivers only paying for 50% of their total gas." (GCX 2 at 2; GCX 35(a)) It cannot be said that Respondent bore the full cost of any gas the employees used, as gas costs are deducted from net book before the fares are split, and Respondent retains plenary authority under the Handbook to modify the pay formula at any time. Respondent's contentions that relevant factors include financial impact or costs of fuel are without merit. Respondent's assertions regarding its financial impact are not supported, defy reality, and are not supported by Board law.

C. Respondent's Interrogation of Employees (Respondent's Exception 3)

Respondent excepts to the finding that it unlawfully interrogated its employees following what the ALJ found to be a protected concerted strike. In addressing this exception, Respondent argues that: 1) this was not a protected strike because it was not spontaneous; 2) "the concept of unlawful interrogation is based on the premise that an employee has the right to maintain secrecy about his Section 7 activity and that the employer is not even allowed to inquire about such." (RB 19) Accordingly, so Respondent argues, it was allowed to interrogate employees who engaged in a work stoppage because it was unprotected and does not fit into the narrow category of a spontaneous secretive activity in which it would limit the Act's protection. (RB 21) Respondent takes the further position that the ALJ erred in finding

unlawful interrogation based on interrogation of union activities and union sympathies. (RB 21)

The ALJ correctly found unlawful interrogation in the questions about why the drivers took the long break, the identity of the leader, in the context of issuing discipline to the drivers for the protected strike. Given that the strike was protected concerted activity, Respondent's questions constituted interrogation about protected concerted activity which would reasonably tend to interfere with the employees' exercise of their Section 7 rights. The interrogation involved several of the taxi drivers over a period of several days, under the pending suspension and the threat of termination if they repeated the conduct. The questions specifically requested the identity of the leader. The only logical reason Respondent wanted to know the identity of the leader would be to take action against the leader; otherwise, there would be no reason to identify the leader. Further, the circumstances of the meetings tend to demonstrate the coerciveness as the questioner was Respondent's manager in charge of disciplining the drivers, and who did so regularly. He was joined by the owner of the company in the supervisor's office – a much more coercive situation than a casual conversation on the facility floor. The formal nature of the meeting was further demonstrated by the fact that the drivers were required to sign final written warnings which warned of termination for repeated conduct. Further, Respondent's argument that the non-spontaneous nature of employee actions removes them from the Act's protection lacks merit. *Chep USA*, 345 NLRB 808, 808, 815 (2005) (rejecting the administrative law judge's finding that a non-spontaneous action was not protected and instead found that his actions were unprotected because his ringing of the break bell "caused the employees to unwittingly engage in a work stoppage"); *City Dodge Center*, 289 NLRB 194, 194-197 (1988), enfd. sub nom. *Roseville*

Dodge, Inc. v. NLRB, 882 F.2d 1355 (8th Cir. 1989) (affirming the administrative law judge's finding that employees engaged in protected refusal to work to address their grievances notwithstanding the pre-arranged nature of their decision) Here, the interrogation was unlawful as correctly found by the ALJ. Cf. *Medcare Associates, Inc*., 330 NLRB at 939-941.

Respondent's argument that its actions are excused in part because the employees did not present their grievances to it is unavailing as it presented no evidence that Respondent used any process to address group concerns. Cf. *HMY Roomstore, Inc.*, 344 NLRB 963 fn. 2 (minimizing the employer's open-door policy where it had not been used to address group complaints); *Eaton Warehousing Co.*, 297 NLRB 958 fn. 3 (1990) (rejecting the employer's argument that it lacked knowledge of the reasons of the walkout where the warehouse manager was told the employees were disgruntled and were thinking about walking out on strike, and noting "the employees' failure to make any specific demand or to notify the Respondent of their reasons for their cessation of work does not render their conduct unprotected" (citing *Serendippity-Un-Ltd*, 263 NLRB 768, 775 (1982)))

D. The ALJ's Findings Regarding the Discharge of Abiy Amede (Respondent's Exceptions 4 and 5)

Respondent excepts to the ALJ's findings that Abiy Amede (Amede) was discharged for a dual motivation and that General Counsel established a prima facie case establishing that Amede was discharged because of his union activities. (RB 24-26) General Counsel previously addressed Amede's termination in its exceptions filed on January 24, 2013.

E. The ALJ's Conclusions of Law, Remedy, Order (Respondent's Exceptions 6, 7, 8)

Respondent argues that it should not be ordered to post a Notice as doing so "would mislead the employees into believing that they can engage in the same conduct again" which would make a Notice posting inappropriate. (RB 24) Similarly, Respondent argues that

requiring discipline to be expunged would similarly be inappropriate for the same reasons. (RB 24) Essentially, Respondent asks the Board to ignore what Respondent did and give it a free pass. Respondent's argument makes no sense as it wants the Board to ignore: 1) its unlawful actions; 2) the standard Remedy the Board uses in addressing such violations; and 3) the only remedy which could potentially restore employee rights under the Act. It is revealing that Respondent cites no case law to support its assertions. Respondent's arguments lack merit and are inconsistent with Board precedent.

IV. CONCLUSION

It is respectfully submitted that, based on the foregoing reasons, the credited record evidence, and applicable Board law, the Board should issue a Decision and Order adopting the ALJ's findings, conclusions, and recommended Order, additionally granting the General Counsel's exceptions previously filed, and providing the remedies deemed appropriate to address and remedy Respondent's violations of Section 8(a)(1) and (3) of the Act, including, but not limited to electronic Notice posting.

Dated at Las Vegas, Nevada, this 7th day of February 2013.

/s/ Larry A. Smith

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CERTIFICATE OF SERVICE

I hereby certify that a copy of ACTING GENERAL COUNSEL'S ANSWERING BRIEF in SUN CAB, INC. d/b/a NELLIS CAB COMPANY, Case 28-CA-079813, was served by E-Gov, E-Filing, E-Mail and Facsimile, on this 7th day of February 2013, on the following:

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